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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

ALUMINUM COMPANY OF AMERICA,
Petitioner,

vs.

SAM H. LOVEDAY et al.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

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To the United States Court of Appeals for the Sixth Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Aluminum Company of America, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause on December 31, 1959.

OPINIONS, JUDGMENTS AND ORDERS BELOW.

Copy of the opinion of the District Court[1] on motions for new trials and copy of judgments of the District Court granting certain of said motions for new trials are appended in the appendix hereto (A. 1a, 14a).[2] Included in

[1] The District Court and the Trial Court referred to in this petition, unless otherwise indicated, is the United States District Court for the Eastern District of Tennessee, Northern Division.

[2] The abbreviation "A." refers to the appendix to this petition.

such appendix is the judgment of the Court of Appeals (A. 18a). The opinion of the Court of Appeals has not been published but such opinion is set forth in the appendix hereto (A. 19a).

Upon motion made by petitioner, said Court of Appeals stayed its mandate on said judgment upon condition that a petition for writ of certiorari be filed with this Court.

JURISDICTION.

Jurisdiction to review by writ of certiorari the judgment of said Court of Appeals entered December 31, 1959, is invoked under the provisions of 28 U. S. C. A., Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

Question One. After a jury trial in a United States District Court does the Trial Judge have the power to grant a new trial solely on the basis of affidavits and testimony of jurors relating to a remark of a juror made in the jury room during the jury's deliberations?

Question Two. If a United States District Court grants a new trial without having the power to do so is such order appealable prior to a retrial?

STATEMENT OF THE CASE.

I.

Bases for Federal Jurisdiction in the United States District Court.

The bases for Federal jurisdiction in the United States District Court of the original complaint were diversity of citizenship between the plaintiffs and the defendant and the amount involved.

II.

Status of the Litigation.

This litigation in the Trial Court involved 75 separate causes of action asserted by some 170 different individuals who sought to recover from the petitioner-defendant, Aluminum Company of America, claimed damages to vegetation, livestock and farm lands allegedly caused by fumes emitted from the smelting and fabricating plants of petitioner-defendant located at Alcoa, in Blount County, Tennessee (R. 250a).[3]

This unique litigation resulted in the longest jury trial that has ever been tried in the District Court of the United States for the Eastern District of Tennessee, Northern Division. The trial was continuous for more than three months and the Court was in session from six to seven hours practically every trial day (R. 251a).

The farms involved are located in Blount County, Tennessee, and lie in all directions from the plants of petitioner-defendant and range in distance from two miles to fourteen miles from the smelting plant, which was the principal plant involved. The original plaintiffs included not only the owners of farm lands but also additional persons who were tenants on some of the farms or who owned livestock kept on some of the farms. Every type of farming operation was involved, including dairying operations, beef feeder operations, the raising and selling of registered dairy cattle, the raising and selling of registered beef cattle, grain and row crop farming operations, hog, sheep and horse operations, as well as operations involving the growing and selling of timber (R. 251a).

132 witnesses testified and 426 exhibits were filed. Included in the subjects of testimony were civil engineering,

[3] The abbreviation "R." used herein refers to the certified record filed in this Court.

chemical engineering, plant pathology, chemistry, botany, agronomy, veterinary science, animal husbandry, animal pathology, dairy husbandry, biochemistry, meteorology, air pollution, real estate valuations and cattle appraisals (R. 252a).

In view of the complex nature of this litigation and the multitudinous issues which were to be presented to the jury, the Trial Court (having theretofore denied motion of petitioner-defendant for severance of the individual causes of action) directed that the trial be divided into two phases.

In Phase I, which phase consumed four weeks of trial time, the jury was asked to decide whether petitioner-defendant had maintained a nuisance to the injury and damage of any of the plaintiffs and, if so, whether the nuisance had been abated and, if abated, the date upon which such abatement had taken place. The jury found that petitioner-defendant had maintained a nuisance with respect to one or more of the plaintiffs but further found that the nuisance had been abated on August 17, 1955 (R. 252a).

In Phase II the jury was asked to decide whether the plaintiff in each separate cause of action had suffered any damage as a result of the temporary nuisance and, if so, the amount of such damage.

During the first portion of Phase II of this litigation the causes of action were tried in groups of five and under this procedure twenty verdicts were rendered during a four weeks period. Thereafter in Phase II the causes of action were tried one at a time and forty-three separate verdicts were rendered under this procedure. Judgments were entered upon all the verdicts rendered (R. 252a).

The net result of the entire proceedings during Phase II was that twenty verdicts were rendered for the defendant (in which the plaintiffs were denied any recovery

whatsoever); forty-three verdicts were rendered for the plaintiffs (in which recoveries were awarded ranging from $300.00 to $4,550.00); upon motions of the plaintiffs nine causes of action were dismissed with prejudice; and the Court permitted three causes of action to be dismissed without prejudice (R. 253a).

Motions for new trials were filed by the plaintiffs in all of the causes of action which were tried, with the exception of one. However, more than half of these motions were voluntarily withdrawn by the plaintiffs. Hence the Trial Court considered twenty-nine motions for new trials and granted fifteen of such motions. The basis upon which such new trials were granted was that during the jury's deliberations one of the jurors remarked to the other jurors that he had, during a week end while the trial was in progress, driven to a restaurant located in the vicinity of some of the plaintiffs' farms, had seen some cattle as he drove along the highway and that such cattle appeared to be in good condition (R. 237a). From the order granting the fifteen new trials petitioner-defendant perfected its appeal to the United States Court of Appeals for the Sixth Circuit and also filed a petition for certiorari with such Court of Appeals. The Court of Appeals dismissed the appeal, denied the petition for writ of certiorari and affirmed the judgment of the District Court. Petitioner is now filing this petition for a writ of certiorari to review the action of the Court of Appeals.

III.

Facts Relating to the Ground for Granting the Fifteen New Trials.

Plaintiffs, in support of their motions for new trials, filed affidavits of two jurors setting forth in effect that juror E. E. Hartman had remarked to his fellow jurors during the jury's deliberations that he had driven in

Blount County, Tennessee, had observed from his moving car unidentified cattle from a public road and had never seen finer looking animals anywhere (R. 204a-207a).

Juror Hartman was not on the trial jury during Phase I of the law suit but only an alternate juror at that time. Mr. Hartman did not enter the jury box or participate in the jury's deliberations until after the verdict in Phase I had been rendered and verdicts had been rendered in fifteen individual causes of action in Phase II (R. 17a, 21a, 255a).

At the hearing on the motions for new trials the Trial Court, over the objection of the petitioner-defendant, permitted juror Hartman and two other jurors to testify concerning the remark which was made by juror Hartman in the jury room during the course of the jury's deliberations (R. 208a-226a, 236a).

Juror Hartman testified that on two different occasions after he had become a juror he, together with his wife, drove from his home in Knoxville, Tennessee, to Spikes Restaurant to have dinner. This was approximately three years after the complete abatement of the nuisance. Spikes Restaurant is located on a main highway in Blount County, Tennessee, near the airport serving Knoxville, Tennessee, and in the general vicinity of the plants of petitioner-defendant. On one of these occasions he slowed, but did not stop, his car and looked at some cattle in a field. He testified that he did not know whose cattle he had observed and did not know whether they were involved in the litigation. On his second trip to the same restaurant, Mr. Hartman did not even slow down his car. At no time did Mr. Hartman stop his car or make any inspection of any cattle. He testified that he traveled to the restaurant over highways that a person would normally use for travel from his home in Knoxville, Tennessee, to the restaurant. Such highways are heavily traveled by persons going from

Knoxville to the Knoxville airport, to Alcoa, Tennessee, and Maryville, Tennessee, and to many other towns and communities located south of Knoxville. Mr. Hartman also testified that he and his wife had on frequent occasions prior to the trial of this litigation made other trips to the same restaurant for the same purpose (R. 210a-216a).

The Trial Court did not grant the fifteen new trials on the ground that Mr. Hartman had made trips to Blount County during the course of the trial, nor on the ground that such trips influenced Mr. Hartman's deliberations as a juror. Such new trials were granted solely on the ground that Mr. Hartman informed the jury of his trips to Blount County. The Trial Court stated:

> "If the juror had not conveyed to his fellow jurors that which he learned from his own inspections, under some of the decisions discussed by counsel here today, there would be a serious question as to whether the Court should grant a new trial. But the juror, as indicated, conveyed that which he learned to his fellow jurors thus presenting to his fellow jurors evidence which they had not heard in open court and evidence about which the juror could not be examined or cross-examined" (A. 11a; R. 237a).

The Trial Court heard testimony as to the date upon which Mr. Hartman made his remark in the jury room during the jury's deliberations (R. 218a-225a), concluded that such remark was made on or about June 23, 1958, and granted new trials to those plaintiffs whose causes of action were tried on and after that date (R. 242a-243a). However, new trials were not granted in a number of causes of action tried after June 23, 1958, and such causes of action were not involved in the appeal to the Court of Appeals, because the plaintiffs in those actions accepted the amounts awarded by the jury and withdrew their motions for new trials (R. 256a).

ARGUMENT— REASONS FOR GRANTING THE WRIT.

I.

The Court of Appeals Has Decided a Vitally Important Question Involving the Sanctity of a Jury's Deliberations.

The fundamental error in the holding of the Trial Court, we submit, is that it considered affidavits of jurors, and permitted jurors to testify, concerning events that transpired in the jury room during the jury's deliberations. In other words, the Trial Court permitted jurors to impeach their own verdict.

The Trial Court obtained its information concerning juror Hartman's visits to Blount County, Tennessee, solely and alone from jurors who related what transpired in the jury room. Only after certain jurors disclosed a remark that occurred in the jury room during the jury's deliberations did the Trial Court ask juror Hartman concerning his visits.

The Court of Appeals, in its opinion, in effect recognized the long established rule that a juror may not impeach his own verdict by revealing proceedings in the jury room. However, the Court of Appeals held that such rule was not applicable in the instant case on the ground that the juror, by viewing the cattle disqualified himself to sit as a juror. The fact remains, however, that the only means by which the Trial Court ascertained what the juror did was by considering affidavits and hearing testimony of jurors concerning matters that occurred within the secrecy and sanctity of the jury room.

This Court has repeatedly held that such sanctity of the jury room must not be violated. In **McDonald v. Pless** (1915), 238 U. S. 264, this Court, in holding that a juror cannot impeach his verdict, stated (p. 267):

". . . When the affidavit of a juror, as to the misconduct of himself or the other members of the jury, is made the basis of a motion for a new trial, the court must choose between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what happened in the jury room.

"These two conflicting considerations are illustrated in the present case. If the facts were as stated in the affidavit, the jury adopted an arbitrary and unjust method in arriving at their verdict, and the defendant ought to have had relief, if the facts could have been proved by witnesses who were competent to testify in a proceeding to set aside the verdict. But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference."

The necessity of protecting the secrecy of the jury's deliberations and protecting the jurors from inquisition is so necessary in the preservation of a sound jury system that this Court has applied the rule even in criminal cases where the rights of personal liberty are at stake. In **Stein v. New York** (1953), 346 U. S. 156, this Court stated (p. 178):

"Nor have the courts favored any public or private post-trial inquisition of jurors as to how they reasoned, lest it operate to intimidate, beset and harass them. This Court will not accept their own disclosure of forbidden quotient verdicts in damage cases, McDonald v. Pless, 238 U. S. 264, 59 L. ed. 1300, 35 S. Ct. 783. Nor of compromise in a criminal case whereby some jurors exchanged their convictions on one issue in return for concession by other jurors on another issue. Hyde v. United States, 225 U. S. 347, 56 L. ed. 1114, 32 S. Ct. 793, Ann. Cas. 1914A 614. . . .

"But this inability of a reviewing court to see what the jury has really done is inherent in jury trial of any two or more issues, and departure from instruction is a risk inseparable from jury secrecy and independence. . . ."

In **Orenberg v. Thecker** (D. C. C. A., 1944), 143 F. 2d 375, the facts presented even a stronger case of alleged influence on the jury by misconduct of two jurors than the facts presented in the instant case. In the **Orenberg** case affidavits were submitted in support of a motion for new trial which stated that during the trial two jurors visited the scene of the accident involved, that one of the jurors made observations, inspections and experiments, and that both jurors reported their observations to the other jurors. The Court of Appeals, in holding that the Trial Court correctly denied a motion for new trial based upon such alleged misconduct, said (p. 376):

"In Economon v. Barry-Pate Motor Co., Inc. [3 F. 2d 84], we said: 'In unmistakable language both this court and the Supreme Court of the United States have held the general rule to be that the testimony of jurors will not be received to impeach their verdict, unless such testimony relates to extraneous influences brought to bear upon them.' In the present case no extraneous

influences, of the kind contemplated by the decisions of this court and of the Supreme Court, were brought to bear upon the jurors . . . That the Supreme Court, in the McDonald case, did not overlook the arguments advanced by appellants in support of their motion is shown by the following additional language: 'And, of course, the argument in favor of receiving such evidence is not only very strong but unanswerable—when looked at solely from the standpoint of the private party who has been wronged by such misconduct. The argument, however, has not been sufficiently convincing to induce legislatures generally to repeal or to modify the rule. For, while it may often exclude the only possible evidence of misconduct, a change in the rule "would open the door to the most pernicious arts and tampering with jurors". "The practice would be replete with dangerous consequences." "It would lead to the grossest fraud and abuse" and "no verdict would be safe." ' It is not necessary to say more or to consider whether it would be reasonable to require jurors, during the course of a trial, to go by roundabout routes, avoiding main traveled streets, or to close their eyes to traffic controls on such streets."

Other authorities setting forth the same principle are:

Eagle Lake Improvement Co. et al. v. United States (1947), 160 F. 2d 482;

Rakes v. United States (1948), 169 F. 2d 739;

Northern Pacific Railway Company v. Mely (1954), 219 F. 2d 199.

In the **Northern Pacific Railway** case, supra, the Court, in holding that jurors cannot impeach their verdicts, set forth in two footnotes (p. 202) some of the reasoning behind this mandatory and essential rule:

"With our ultramodern genius for attempting to remove the luster from solid gold, the ethical and spiritual significance of a jury verdict has been almost

destroyed. If there can only be televised jury deliberations, the process will be complete. Yet one of the great bulwarks of liberty is that a jury can acquit against the evidence and the directions of the judge because it reflects the ethical feeling of a community, kindled by a divine spark. Historically, the jury was a substitute for the judgment of God in ordeal or by battle. If trial juries are properly handled, they still catch the spark.

"* * * born of the fear of the Star Chamber and of the tyranny of the Stuarts. * * * It stands for a great principle, which is not to be whittled down or sacrificed.' Cardozo, J., in Clark v. United States, 289 U. S. 1, 17, 53 S. Ct. 465, 470, 77 L. Ed. 993."

The Court of Appeals in the instant case appears to hold that juror Hartman disqualified himself by his casual observation of some unidentified cattle nearly three years after the nuisance was abated and hence holds that the action of the Trial Court was proper, but the Court of Appeals in so holding ignores the fact that the information concerning juror Hartman was gathered by prohibited means. As this Court recognized in the **McDonald** case, quotient verdicts are improper but a court cannot look into the jury room to determine if quotient verdicts have been rendered. Thus, even if juror Hartman's visits to Blount County, Tennessee, were improper, the Court still cannot look into the jury room to ascertain that such visits were made. On the basis of the **McDonald** case, the **Stein** case, and the other authorities heretofore cited a trial court does not have the power to grant a new trial solely on the basis of affidavits and testimony of jurors relating to a remark made by a juror within the jury room during the jury's deliberations. Therefore, we submit that the Court of Appeals, by its decision, has in effect "whittled down or sacrificed" the long established sanctity of a jury's deliberations.

We most respectfully insist that if the decisions of the Court of Appeals in this case is permitted to stand the door will be opened for counsel and courts to conduct post-trial inquisitions of jurors and to make "what was intended to be a private deliberation the constant subject of public investigation".

II.

The Court of Appeals for the Sixth Circuit Has, in Effect, Decided the Procedural Question of Appealability of Orders Granting New Trials Contrary to the Decisions of the Supreme Court and of Other Courts of Appeals.

The Court of Appeals for the Sixth Circuit, in its opinion, stated that "an appeal does not lie from an order granting a new trial". While it is recognized that this statement expresses the general rule, nevertheless such statement does not take cognizance of the exception to the rule, which exception has been recognized by this Court and a number of the Courts of Appeals, namely that an appeal will lie from an order granting a new trial when the trial court lacks the jurisdiction or power to make such order.

This Court, in the case of **Phillips v. Negley** (1886), 117 U. S. 665, said (p. 671):

> "The vacating of a judgment and granting a new trial, in the exercise of an acknowledged jurisdiction, leaves no judgment in force to be reviewed. If, on the other hand, the order made was made without jurisdiction on the part of the court making it, then it is a proceeding which must be the subject of review by an appellate court."

In the later case of **Fairmount Glass Works v. Cub Fork Coal Company** (1933), 287 U. S. 474, this Court again said (p. 482):

> "Under certain circumstances the appellate court may inquire into the action of the trial court on a

motion for a new trial. Thus, its denial may be reviewed if the trial court erroneously excluded from consideration matters which were appropriate to a decision on the motion. Mattox v. United States, 146 U. S. 140, 36 L. ed. 917, 13 S. Ct. 50; Ogden v. United States (C. C. A. 3d), 112 Fed. 523; or if it acted on the mistaken view that there was no jurisdiction to grant it, or that there was no authority to grant it on the ground advanced. Felton v. Spiro (C. C. A. 6th), 78 Fed. 576, 581, 2 Am. Neg. Rep. 688; Dwyer v. United States (C. C. A. 9th), 170 Fed. 160, 165; Paino v. St. Paul Union Stockyards Co. (C. C. A. 8th), 35 F. (2d) 624, 626-628. It becomes necessary, therefore, to determine whether the circumstances of the case at bar justify an inquiry into the trial court's refusal to set aside the verdict."

In the case of **Freid v. McGrath** (1942), 133 F. 2d 350, the Court of Appeals for the District of Columbia Circuit said (p. 353):

"... it is urged that the Supreme Court has declared a rule which forbids review, by an appellate court, of the action of a federal trial court in granting a new trial. Obviously, there is no such rule of absolute and universal operation. Otherwise, the district court might grant new trials in cases over which it had never acquired jurisdiction, as in cases tried in the municipal court; or where it had lost jurisdiction, as in cases pending on appeal in this court or in the Supreme Court and in cases long since concluded, with judgments satisfied of record; all without let or hinderance, while this court and the Supreme Court must stand by powerless to act upon the appeals of despoiled litigants."

In the case of **Jackson v. Wilson Trucking Corp.** (1957), 243 F. 2d 212, the same Court of Appeals stated the same rule even more emphatically as follows (p. 214):

"An order granting a new trial is not ordinarily reviewable. But where, as in the case at bar, such an order exceeds the power of the court it may be reviewed notwithstanding the absence of a final judgment. Phillips v. Negley, 117 U. S. 665, 671, 6 S. Ct. 901, 29 L. Ed. 1013; Freid v. McGrath, 76 U. S. App. D. C. 388, 133 F. 2d 350."

See also:

Bailey v. Slentz et al. (C. A. 10, 1951), 189 F. 2d 406; **John E. Smith's Sons Company v. Lattimer Foundry & Machine Company** (C. A. 3, 1956), 239 F. 2d 815.

The legal proposition now under consideration is summarized in Moore's Federal Practice, Second Edition, Volume 6, Section 59.15 (1), as follows:

"To the general proposition that an order granting a new trial is non-appealable, an old line of authority makes the following exception: an order granting a new trial is appealable when the ground therefor is that the trial court lacked jurisdiction or power so to order."

Apparently the Court of Appeals for the Sixth Circuit did not recognize in this case the exception which is spelled out in the foregoing authorities. Hence, that Court has, in effect, laid down a procedural rule that is in conflict with the opinions of this Court and in conflict with the Courts of Appeals of other Circuits. Therefore, we submit that if the opinion of the Court of Appeals is permitted to stand in the instant case, litigants in the Sixth Circuit will be subject to a different procedural rule than are the litigants in other Circuits in reference to the appealability of the action of a trial court in granting a new trial in those instances where the trial court acted beyond its power or jurisdiction.

CONCLUSION.

We submit that the questions here involved are of importance to litigants and counsel in the Sixth Circuit. The result of the decision of which review is herein sought vitally affects the sanctity of the jury system and vitally affects the procedure in reference to the appealability of the action of a trial court in granting a new trial without having the power or jurisdiction to so act.

For the reasons stated, it is respectfully submitted that this petition for writ of certiorari should be granted.

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In the
UNITED STATES DISTRICT COURT
For the Eastern District of Tennessee,
Northern Division

PAUL H. HITCH et al., Plaintiffs,

vs.

ALUMINUM COMPANY OF AMERICA, Defendant.

Civil Action
No. 2744.

COURT'S OPINION IN PLAINTIFFS' MOTION FOR NEW TRIAL.

September 3, 1958.

This cause came on to be heard on motions for new trials on behalf of certain plaintiffs before the Honorable Robert L. Taylor, District Judge, on Wednesday, September 3, 1958, counsel for the respective parties being present, when at the conclusion of all oral argument presented by counsel the Court delivered the following opinion:

The Court: This case is before the Court on motions for a new trial made by numerous plaintiffs. At the beginning of the trial on April 7th, 1958, there were 74 separate alleged causes of action set forth in the complaint. Counsel in their brief stated that in 43 of these separate causes of actions verdicts were awarded in favor of the plaintiffs; voluntary non-suits were taken in nine of the cases with prejudice; three voluntary non-suits (the Court understood that there were only two) were taken without prejudice, and 19 verdicts were rendered in favor of the defendant.

In the case of Moses W. Howard and Wife vs. The Aluminum Company of America, Civil Action No. 1949, which was consolidated for purposes of trial with the case of

Paul Hitch et al. vs. The Aluminum Company of America, Civil Action No. 2744, a non-suit was taken with prejudice.

In the Howard case the plaintiff did not put on any proof but relied upon the record as a whole and the Court was required to direct a verdict in favor of the defendant. Motion for a new trial has not been made in the Howard case.

The 19 plaintiffs who failed to obtain verdicts at the hands of the jury have filed motions for new trials. Motions for new trials were filed by other plaintiffs but counsel state in their brief that 33 of the motions, in cases in which judgments were rendered for the plaintiff, have been withdrawn.

As the case now stands, according to the Clerk's records and statements of counsel in one of the briefs, there remain for consideration of the Court the motions for new trials in 29 of the actions, in ten of which judgments were rendered for plaintiffs and in 19 of which judgments were rendered for defendant.

The first motion for a new trial was filed on May 26th, 1958 by H. G. Helms and 13 other plaintiffs. This motion was filed within ten days after judgment was entered on the verdict, hence was filed within the time required by the applicable rule, which is Rule 59 (b).

There were three grounds set forth in that motion; namely, the verdict was inadequate, the verdict was so inadequate that it indicated passion and prejudice and caprice on the part of the jury, and finally the jury failed to apply the law as given by the Court in its charge.

The other plaintiffs filed their motions for new trials on June 4th, June 9th, June 23rd, June 30th, July 10th, July 11th, July 14th, July 17th and July 24th, 1958. All these motions were filed within the ten days' time except the amended motion which was filed July 24th, 1958 in

which 16 separate grounds were urged in support of the motion.

The motion that was filed on July 24th, 1958, which as indicated included additional grounds, was filed within ten days of the date of entry of judgment in the cases of R. B. Wheeler et ux, Ben Clark et al. and K. L. Cruze et al.

The defendant says that the grounds urged in the motion filed on July 24th, 1958 cannot be consjdered in any of the cases except the ones last named, which are the Wheeler, Clark and Cruze cases, because such grounds were asserted more than ten days after judgment was entered on the verdict of the jury and that the plaintiffs and their counsel had knowledge of all the additional grounds asserted in the motion on July 24, 1958 with the possible exception of grounds 14 and 15.

This presents the first legal question for the determination of the Court. In the light of the views held by the Court on the various motions which will be later stated, it is not necessary for the Court to pass on this question.

Rule 59 (b) of the Federal Rules of Civil Procedure provides that a motion for a new trial shall be served not later than ten days after entry of the judgment. Rule 6 (b) states that the Court may not extend the time for filing a motion for a new trial.

The time limitation in the rule is to prevent a motion from being used in a dilatory manner in order to extend the time for appeal as indicated by Professor Moore in his work on federal practice, Vol. 6, Ch. 59.09, "Proper Time and Manner of Filing Motions for New Trial," page 3842. if the motion is not filed in time the Court has no choice other than to deny it. After it is denied the time for appeal begins to run. A timely motion tolls the time within which an appeal may be taken. Since the time for appeal is tolled by the timely filing of the motion, reason would require the allowance of an amendment to the motion even

though the amendment is filed after the ten-day period. The weight of authority, however, is to the effect that the Court may not consider an amendment that adds an additional ground if such amendment is made after the ten-day period provided the parties knew of the grounds contained in the amended motion or should have known of such grounds by the exercise of ordinary diligence. If the added grounds though, made after the ten-day period, were not known by the parties or could not have been known, such grounds are in the nature of newly discovered evidence and the Court may consider them under Rule 60 (b). See Moore's Federal Practice, Volume 6, "Amendments to Motion," Chapter 59.09, page 3850; also, Rule 60 (b), Federal Rules of Civil Procedure.

Plaintiffs contend that since this suit involves multiple claims that Rule 59 (b) does not apply; that the controlling rule of the case is Rule 54 (b), which provides in substance that in case of multiple claims the motion for a new trial may be delayed until the last claim is determined by the Court unless the Court by specific order states that there is no reason for delay for the direction of the entry of a judgment on a particular claim. That rule applies to multiple claims and not multiple parties.

If the judgment is on a distinct and separate claim in a case involving multiple parties, the majority of the courts hold that the time for the motion for a new trial starts when the judgment is entered, and if the motion is not filed within ten days from the date of the entry of the judgment the court is without authority to consider the motion. If the liability is joint, a judgment against one is not final until all of the claims are adjudicated. See Moore's Federal Practice, Volume 6, "Multiple Litigation" and "Single Judicial Unit Theory," Chapter 54.19, pages 157-160.

In order that the upper court in the event of an appeal may have the views of this Court on the grounds set forth

in the amended motion after the limitation period, except Grounds 14 and 15, which were timely filed, the Court will consider them at this time although the majority rule is to the effect that they cannot be made the basis of a new trial because they were filed too late.

Ground No. 1 of the amended motion asserts that the Court erred in failing to charge as requested in Special Request No. 5 of plaintiff. This requested charge was, in substance, that if any of the plaintiffs sustained a permanent injury to their cattle the jury should award damages for such permanent injury in addition to the damages for the interference with the use and enjoyment of the property.

The Court is of the opinion that the question of damages was fully explained to the jury and that this ground is lacking in merit.

Ground No. 2 of the amended motion asserts that the Court erred in failing to tell the jury the loss of reputation of plaintiff's animals as brood stock was an element of damages. The Court in ruling on the questions of evidence stated in substance to the jury that they could consider the loss of reputation for high-bred stock among the plaintiffs as an element of damages. As the Court recalls two or more witnesses, expert in character, testified to the jury on this subject which testimony was allowed to go to the jury. Moreover, the substance of this request was covered in the general charge.

Ground No. 3 of the amended motion—and the grounds now under consideration all refer to the amended motion unless otherwise stated—asserts that the Court erred in failing to charge the jury that it was not necessary for any of the plaintiffs to cease their activities as farmers by selling their cattle and moving to farms outside of Blount County.

What the Court told the jury in the general charge certainly brought home to the jury that it was not necessary for the farmers to sell their cattle and to move from their farms in order for them to recover damages which they had sustained in the case.

The Court on numerous occasions in ruling on points of evidence as well as on parts of its charge stated to the jury that in determining damages sustained by the plaintiffs they should consider any interference with their use and enjoyment of their farms that was connected with the nuisance as an element of damage.

Grounds Nos. 4 and 5 also complain of the Court's action in refusing to charge special requests. The Court is of the opinion that these grounds are also lacking in merit.

Grounds Nos. 6 and 7 complain of the action of the Court in refusing to discharge the juror Hartman because of the matters set forth in those grounds.

The Court during the trial heard proof on the matters referred to in these two grounds in chambers in the presence of counsel for all the parties and was convinced then that the grounds charged were not sufficient to justify the Court in excusing or discharging Mr. Hartman from the jury. This Court is still of that opinion.

Ground No. 8 asserts that the Court erred in failing to declare a mistrial because Juror Duncan talked to two of the plaintiffs during a weekend recess.

The record will show that the Court offered to excuse Juror Duncan if either side requested. Both sides agreed for Juror Duncan to continue to serve as a juror. The Court also heard proof on this question and was of the opinion then and is still of the opinion that that which Juror Duncan was alleged to have said to two of the plaintiffs was not a sufficient justification for the Court to declare a mistrial.

Ground No. 9 complains of the Court's failure to allow plaintiffs to take a voluntary non-suit. What has been stated in respect to Ground No. 8 applies to this ground.

Grounds Nos. 10, 11, 12 and 13 complain of the action of the Court in not discharging Juror Sandlin or declaring a mistrial or permitting plaintiffs to take a voluntary non-suit because of the alleged misconduct of Juror Sandlin that took place during the trial.

One of the grounds of misconduct is what the Juror Sandlin spoke to Richard Carson, Esquire, one of the attorneys for the plaintiffs, to the effect that "Dick, let's get along with the trial."

Of course, the Court does not condone statements of that kind or actions of that kind by a juror. The statements were made under stress of circumstances, and the Court was of the opinion after hearing counsel for both sides in chambers concerning the matter and is still of the opinion that the Court acted properly in refusing to discharge Mr. Sandlin from jury service.

Reference is also made in one of the grounds relating to Juror Sandlin that the Court should have excused him when he said he was physically unfit to serve.

In the opinion of the Court a reading of what was said by the juror Sandlin in chambers in the presence of counsel for all parties will show that Mr. Sandlin did not say that he was physically unfit to continue service as a juror. The Court offered to excuse him if he felt that he was not physically able to serve.

Juror Sandlin was accepted by plaintiffs and by the defendant, and although plaintiffs apparently felt that he was not treating them in a fair manner, such feeling did not justify the Court in peremptorily discharging him from jury service. It is a serious and grave matter for the Court during a trial to discharge a juror in service. In order to justify such action there must be a sound basis.

Ground No. 16 asserts that the Court erred in requiring the jury to hear and determine five claims or actions at a time.

The record will show that during the pre-trial conference this procedure was discussed, and so far as the Court knew it was satisfactory to all parties. The Court in trying the cases together and in trying five claims at the same time, acted in part at the instance of the plaintiffs because the plaintiffs had asserted through their counsel in the discussions of some of the motions that if the cases were not consolidated and tried at the same time that the expense of the trial would be a tremendous burden on the plaintiffs. In other cases, particularly condemnation cases by the Government, as many as six and eight parcels of land for the taking of which damages were claimed have been considered by the jury at the same time.

The Court knew of no reason then and knows of none at the present time why the jury could not consider five claims at a time and do justice to all parties. True, at the request of the jury and with the consent of all parties, the pre-trial order was amended so as to permit the jury to consider the claims singly.

In the opinion of the Court this ground is without merit.

The Court is of the opinion that the grounds urged in support of the amended motion are lacking in merit except Grounds 14 and 15. These grounds will now be considered.

Grounds Nos. 14 and 15 present more troublesome questions.

Ground No. 14 asserts that Juror P. E. Hartman was guilty of misconduct in that during the trial he viewed or inspected cattle that were located in the Blount County area that was involved in the suits.

In support of this ground affidavits have been filed by Juror Moneymaker, who testified during this hearing in

the motions, and Juror Thomas. Mr. Moneymaker heard Juror Hartman state that he had visited what will be referred to as the critical area on more than one occasion and that he had observed the cattle on those visits and they looked to be fine cattle. Mr. Moneymaker is of the opinion that those statements were not made by Juror Hartman until the last week of the trial.

The affidavit of Mrs. Thomas, a juror, states in substance that Juror Hartman on various occasions stated that he had travelled about Blount County while the trial was in progress and had observed numerous herds of cattle on numerous farms and he had never seen finer looking cattle.

The affidavit also states that Hartman told the jury "that the Aluminum Company employed a large number of people, stating the number, and remarked that this fed many hungry mouths. This statement was made in a loud voice, drowning out the voice of the witness then being interrogated. In consequence of the matters here stated affiant was forced to request the Juror Hartman to be quiet so she could hear the witness's testimony."

The substance of that which is contained in the quoted language is made the basis of Ground No. 15 of the amended motion for a new trial.

Defendant contends that the Court cannot consider these affidavits or the testimony of jurors relating to the subject because of the rule in the state courts of Tennessee and the federal rule in the Sixth Circuit that the jurors will not be heard to impeach their verdict.

The rule that jurors cannot impeach their verdict is a well-recognized rule. It is not controlling of the situation in this case for the reason that the alleged misconduct of Juror Hartman involved extraneous matters. If the matter of inquiry involves extraneous matters considered by the jury in arriving at their verdict, then the Court may under

various circumstances receive affidavits and oral testimony pertaining to such matters.

Neither plaintiffs nor their counsel knew anything about these alleged statements of Juror Hartman to the jury, and could not have known about them because they were not at liberty to question the jury during the trial about those matters or any other matters. In view of this situation is the Court precluded from considering these grounds even though they were asserted in a motion more than ten days after judgment was entered in all of the cases except three?

Counsel for the Aluminum Company in their carefully prepared briefs do not say unequivocally that the court cannot as a matter of law or should not consider these grounds. The Court is of the opinion that these grounds were made the basis of the amended motion for a new trial within the time allowed by law.

If the Court is not permitted to consider these grounds under Rule 59 (b) of the Federal Rules of Civil Procedure, it is permitted to consider them under Rule 60 (b) of the Federal Rules of Civil Procedure because they involve newly discovered evidence.

This brings us to the question as to whether or not that which Mr. Hartman admittedly did was misconduct, and if so was it of such character to require the Court to grant a new trial?

Although the Court is of the opinion and holds that Mr. Hartman did not make these visits and inspections of the cattle in pursuance of an evil motive, it is firmly of the opinion that such inspections amounted to legal misconduct. In so holding the Court does not intend to and in fact does not reflect on the honesty and character of the Juror Hartman. That which he did was most unfortunate for all the parties to this litigation.

If the juror had not conveyed to his fellow jurors that which he learned from his own inspections, under some of the decisions discussed by counsel here today, there would be a serious question as to whether the Court should grant a new trial. But the juror, as indicated, conveyed that which he learned to his fellow jurors thus presenting to his fellow jurors evidence which they had not heard in open court and evidence about which the juror could not be examined or cross-examined.

The main question in the second phase of the litigation was whether or not the cattle of the plaintiffs had been damaged by the nuisance which the jury found and if so to what extent.

The juror during the trial visited the critical area and viewed the cattle, and on one occasion slowed down his car and then returned to the jury room and reported to his fellow jurors in substance that the cattle were about the best looking cattle that he had seen in a long time.

The Court is of the opinion and finds that the conduct of Juror Hartman prejudiced plaintiffs' claims in the minds of one or more of the jurors.

The first of these visits were not made before Sunday, June 22nd, 1958, and the information pertaining thereto was not conveyed to the other jurors before Monday, June 23rd, and neither the visits nor what was said about them could affect the verdicts rendered by the jury prior to June 23, 1958.

The Court is of the opinion and holds that Ground No. 14 of the motion for a new trial is well taken and is sustained insofar as it applies to the verdicts rendered on and subsequent to June 23, 1958.

A new trial is granted only on the question of damages with respect to the claims involved in the verdicts on and after June 23, 1958. In other words, a retrial of these

claims will follow the same course as the other claims followed in the trial involving the second phase of the lawsuit.

We now come to Grounds Nos. 1, 2, 3 and 4 of the original motions. These grounds relate to the action of the jury in failing to render adequate verdicts, in basing their verdicts on alleged passion, prejudice, untenable caprice, and failure to follow the instructions of the Court. The fourth and last ground asserts that in the cases where damages were denied altogether that such verdicts were without support by the evidence.

This Court cannot hold that any of the verdicts were based on passion, prejudice or caprice. Neither can the Court hold that the jury failed to apply the law as given by the Court in its charge except in the two cases hereinafter mentioned, nor can the Court hold that in the cases wherein the plaintiffs were denied damages that the verdicts were not supported by the evidence.

In that connection the issue of liability was sharply drawn in the first phase of the case. The jury found that the defendant created and maintained a temporary nuisance which was abated August 17, 1955. The Court is of the opinion and finds that there is substantial evidence to support that verdict of the jury. Apparently complaint is not made by either of the parties of this verdict.

In the second phase of the case each plaintiff claimed substantial damage. Defendant denied strenuously that each plaintiff was entitled to recover anything from it. Numerous witnesses were introduced by the respective parties purporting to support their respective theories. A number of these witnesses were veterinarians. Some of the testimony of the veterinarians was so conflicting that it was almost irreconcilable.

The jury saw and heard the witnesses. It is the prerogative of the jury to pass on the credibility of the witnesses.

The Court has no right to substitute its judgment for the judgment of the jury. The evidence presented issues of fact for the determination of the jury. In the opinion of the Court there is substantial evidence to support the verdict of the jury except as hereinafter found. See Wortham Bag Corp. v. Agnew, 6 Cir., 202 F. 2d 119.

The question in these four grounds for a new trial which has given the Court the most concern is the adequacy of the awards in some of the cases in which awards were made. Clearly in those cases in which awards were not made the question of whether there should or should not be an award was one for the jury and the jury's decision is supported by substantial evidence.

The Court is of the opinion and finds as a fact that there is substantial evidence to support the verdict of the jury in all of the actions except in the actions of J. P. Anderson et al. v. Aluminum Company of America, and T. H. Brown et al. v. Aluminum Company of America.

In the Anderson case the award was $1000.00. The proof showed that Anderson owned and operated a dairy. The verdict in that case, if there was any liability, about which the Court intimates no opinion, is inadequate in the light of the record as a whole and particularly some of the awards made in favor of other plaintiffs whose farms were in close proximity to the Anderson farm. In the opinion of the Court the verdict of the jury in this case was inconsistent on its face.

The award in favor of T. H. Brown was $600.00. What has been said in the Anderson case applies equally to the Brown case.

For these reasons the motions of Anderson and Brown for a new trial are granted.

Let an order be prepared and presented in accordance with the views herein expressed.

In the
DISTRICT COURT OF THE UNITED STATES
For the Eastern District of Tennessee,
Northern Division.

PAUL H. HITCH et al., Plaintiffs,

vs.

ALUMINUM COMPANY OF AMERICA, Defendant.

No. 2744.

JUDGMENTS ON MOTIONS FOR NEW TRIAL.

This case came on for hearing upon the pending original motions for a new trial and upon the pending amended or supplemental motion for a new trial, together with the affidavits of the jurors, Paul W. Moneymaker and Mrs. C. H. Thomas, which motions and affidavits were filed by the plaintiffs, Dr. J. C. Anderson, Dola N. Anderson, James P. Anderson and Martha B. Anderson; Horace R. Everett and Mae T. Everett; Marley Francis and Edith A. Francis; James B. Lovingood; T. H. Brown, Sr., Mrs. Lela Brown and T. H. Brown, Jr.; Earl L. Wilkinson and Catherine Wilkinson; Walter R. Pate, Irene Pate and Mack Pate; R. F. Bartholomew and Freeda Bartholomew; George Callahan and Evelyn M. Callahan; H. D. Loveday and Ida M. Loveday; L. H. Shields and Mary Shields; J. E. Coleman and Kate Coleman; P. A. Waters and Ada Waters; Raymond DeVault and Kirty Lee DeVault; Sam H. Loveday and Stella Loveday; Thomas Franklin Hitch; Hubert Young, Irene Young, Roxie Harrison, Jessie Carpenter, Ollie Young, Ruby Russell, Hayden Cawood, Vera Carpenter, Mary Catherine Porter, Fred Young, Roy Young

and Gary Paul Labor by Hubert Young, as next friend; Clyde Callahan and Beulah Callahan; John W. Hodge and Lillie Hodge; Roy O. Davis and Lena Davis; Creed Montgomery, Indietta Montgomery, Elbert Montgomery, Iris Montgomery, June Montgomery Harris and Mrs. Minnie Montgomery; J. F. Walters and Grace Walters; A. P. Crumley and June T. Crumley; O. M. Barbra and Lola Barbra; Paul Kidd and Georgie B. Kidd; Russell Myers and Mae Myers; Mrs. Ellen H. Wheeler and R. B. Wheeler; Ben C. Clark and Jim Hall; and K. L. Cruze and Elizabeth Cruze, whereupon the juror, E. E. Hartman, was called to the witness stand by said plaintiffs, at the suggestion of the Court, and testified with reference to certain conduct upon his part and certain statements made by him with reference thereto, and which are referred to in the supplemental motion for a new trial and the affidavits in support thereof, and the jurors, R. S. Reynolds and Paul W. Moneymaker, having also been called to the witness stand and testified with reference to the time of the making of such statements by the juror Hagtman.

And the Court having heard such testimony and the argument of counsel on said motions and having fully considered the briefs on said motions as filed by the respective parties doth overrule all of the grounds set forth in the amended motion, with the exception of the fourteenth ground thereof. As to the fourteenth ground, set forth in said amendatory or supplemental motion, the Court doth find, order and adjudge that said ground was timely filed and served and is well made, and that said juror Hartman, by reason of his viewing of certain cattle in Blount County, Tennessee, during the time that he was sitting on said jury as a trial juror and reporting to the other jurors with reference to his viewing of said cattle, was guilty of such misconduct that those plaintiffs whose cases were deliberated upon and in which verdicts were rendered subsequent

to the time of his making of the statements to the jury are entitled to a new trial. The Court further finds from the testimony of the jurors that this occurrence took place on or after June 23, 1958.

It Is Accordingly Ordered, Adjudged and Decreed by the Court that as to all those plaintiffs who presently have motions for a new trial pending before the Court and whose cases were considered and verdicts rendered by the jury before June 23, 1958, the amendatory or supplemental motion for new trial is overruled in its entirety, but it is ordered that the plaintiffs Sam H. Loveday and Stella Loveday; Thomas Franklin Hitch; Hubert Young, Irene Young, Roxie Harrison, Jessie Carpenter, Ollie Young, Ruby Russell, Hayden Cawood, Vera Carpenter, Mary Catherine Porter, Fred Young, Roy Young and Gary Paul Labor, by Hubert Young as next friend; Clyde Callahan and Beulah Callahan; John W. Hodge and Lillie Hodge; Roy O. Davis and Lena Davis; Creed Montgomery, Indietta Montgomery, Elbert Montgomery, Iris Montgomery, June Montgomery Harris and Mrs. Minnie Montgomery; J. E. Walters and Grace Walters; A. T. Crumley and June T. Crumley; O. M. Barbra and Lola Barbra; Paul Kidd and George B. Kidd; Russell Myers and Mae Myers; Mrs. Ellen H. Wheeler and R. B. Wheeler; Ben C. Clark and Jim Hall; and K. L. Cruze and Elizabeth Cruze, each of whose claims or actions on what is known and designated as Phase II of this case, was considered by the jury subsequent to June 23, 1958, be, and they hereby are, granted a new trial on said Phase II of these actions, namely, for the determination by a jury of whether these named plaintiffs, or any of them, at any time during the period in which the jury found in Phase I of this case that the defendant maintained a temporary nuisance in so far as said period is applicable to them, respectively, in view of any previous settlements and/or the statute of limitations, suf-

fered any damage from the maintaining of such temporary nuisance by the defendant, and if so, the respective amount or amounts thereof.

The Court doth further overrule all grounds set forth in the original motions for new trial filed by each and all of said plaintiffs, except as to the plaintiffs, Dr. J. C. Anderson, Dola N. Anderson, James P. Anderson and Martha B. Anderson and T. H. Brown, Sr., Lela Brown and T. H. Brown, Jr. As to these two sets of plaintiffs the Court is of the opinion, and doth hold, that they should be granted a new trial for the reason that, in the opinion of the Court, if they are respectively entitled to any award the awards as made to them by the jury are inadequate.

Therefore the plaintiffs, Dr. J. C. Anderson, Dola N. Anderson, James P. Anderson and Martha B. Anderson, and the plaintiffs, T. H. Brown, Sr., Lela Brown and T. H. Brown, Jr., are granted a new trial in what is known and designated as Phase II of these actions, namely, for the determination by a jury of whether these named plaintiffs, or any of them, during the period between January 1, 1953, and August 17, 1955, during which period the jury in Phase I found that the defendant maintained a temporary nuisance, suffered any damage from the maintaining of such temporary nuisance by the defendant and, if so, the respective amount or amounts thereof. All other grounds asserted by the said Anderson and Brown plaintiffs in their said original motions for new trial are overruled.

In so far as concerns the plaintiffs whose motions for new trial have been entirely overruled, in view of the Order heretofore entered with reference to taxation of costs, no portion of the costs of the case will be adjudicated against them. In so far as concerns the plaintiffs who are granted a new trial by this Order the adjudication of any

costs not hereinbefore awarded shall await the further action of the Court.

Enter

ROBT. L. TAYLOR,
Judge.

O. K. as to Form:

J. H. DOUGHTY,
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JUDGMENT.

(Filed December 31, 1959.)

Appeal from the United States District Court for the Eastern District of Tennessee.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the appeal is dismissed, the petition for writ of certiorari is denied, and the judgment of the District Court granting the motions for new trial is affirmed.

No. 13,782.

UNITED STATES COURT OF APPEALS
For the Sixth Circuit.

ALUMINUM COMPANY OF AMERICA, Appellant, v. SAM H. LOVEDAY, Et Al., Appellees.	Appeal from the United States District Court for the Eastern District of Tennessee.

Decided December 31, 1959.

Before: McAllister, Chief Judge; Martin and Weick, Circuit Judges.

Per Curiam. In this protracted litigation in the Eastern District of Tennessee, the trial judge granted the motions for new trial of certain plaintiffs whose cattle had been injured and whose property had been damaged from injurious gases sent forth from the plant of appellant, Aluminum Company of America. The correctness of the action of the trial judge is challenged by direct appeal and, in the alternative, by petition for writ of certiorari.

The principal reason for granting a new trial by the district court was based on affidavits and testimony of jurors regarding remarks of one of the jurors concerning his personal observation of cattle: that, during the trial, he had visited the critical area, viewed the cattle, and had returned to the jury room and reported to his fellow jurors, in substance, that the cattle were about the best looking he had seen in a long time. The United States

District Judge expressed the opinion and made a finding that the conduct of the juror had prejudiced the claims of the plaintiffs in the minds of some of the jurors.

The appellees contend that the order from which the appeal was taken is not a final order and, therefore, is not appealable; that this court has no jurisdiction to hear the appeal, nor to grant the writ of certiorari for which the appellant prays; and that the district court had full authority and jurisdiction to act upon and grant the motions for new trial. **Roche v. Evaporated Milk Association**, 319 U. S. 21; **City of Louisa v. Levi**, 140 F. (2d) 512, 513 (C. A. 6); **Turnbull v. United States**, 139 F. (2d) 126 (C. A. 6); **Borg-Warner Corporation v. Whitney**, 121 F. (2d) 444 (C. A. 6); **Gillespie v. Schram**, 108 F. (2d) 39 (C. A. 6); **Grand Trunk Western R. Co. v. McHie**, 100 F. (2d) 86 (C. A. 6).

It is well settled that an appeal does not lie from an order granting a new trial. **Ford Motor Company v. Busam Motor Sales, Inc.**, 185 F. (2d) 531, 533 (C. A. 6), citing authorities; **Frank Mercantile Corporation v. Prudential Insurance Company of America**, 115 F. (2d) 496 (C. A. 3). Chief Justice Taft, when a member of this court in 1897, stated that a motion for a new trial is addressed to the discretion of the court and is not the subject of review, when in the exercise of his discretion the trial court either grants or denies the motion. **Felton v. Spiro**, 78 Fed. 576 (C. A. 6).

We are aware of the splendid contribution made to due process of law by Mr. Justice Lamar in **McDonald v. Pless**, 238 U. S. 264, in which he wrote most eloquently to the effect that a juror may not be permitted to impeach his own verdict by revealing proceedings in the jury room. In our opinion, however, this authority is not applicable here for the reason that, disregarding what the recreant juror may have told his fellow jurors about the fine appearance

of the cattle, he, as one of the jury panel, by his extraneous action in viewing the cattle and determining that they looked fine, disqualified himself to sit as a juror. When he sat, he polluted the jury's verdict.

The same result is reached, whether or not our review is bottomed upon the motion of the appellee to dismiss the appeal, or to deny the petition of appellant for writ of certiorari. The action taken by the district court was in the exercise of his jurisdiction and was not such abuse of his judicial discretion as to constitute reversible error.

Accordingly, the appeal is dismissed, the petition for writ of certiorari is denied, and the judgment of the district court granting the motions for new trial is affirmed.

FILE COPY

No. 790

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950

ALUMINUM COMPANY OF AMERICA,
Petitioner,

vs.

SAM H. LOVEDAY et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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No. 790.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

ALUMINUM COMPANY OF AMERICA,
Petitioner,

vs.

SAM H. LOVEDAY et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Tennessee, Northern Division has not been published, and it, along with Judgments of the District Court granting the motions for new trials are

set forth in the appendix of petitioner. The opinion of the United States Court of Appeals for the Sixth Circuit has not been published and is set forth in the appendix of petitioner. Any reference herein to the opinions and judgments of the District Court and the Court of Appeals shall be to the appendix to petitioner's brief.

JURISDICTION.

Judgment of the Court of Appeals was entered on December 31, 1959. The jurisdiction of this Court is invoked under the provisions of **28 U. S. C. A., Sec. 1254 (1).**

STATUTES INVOLVED.

1. 28 U. S. C. A., Sec. 1291 is set forth in the appendix hereto p. 11.

2. 28 U. S. C. A., Sec. 1651 (a) is set forth in the appendix hereto p. 11.

QUESTIONS PRESENTED FOR REVIEW.

1. Is an order of a District Court, which grants a new trial upon affidavits and testimony of jurors disclosing the misconduct of a juror outside the jury room and the introduction by said juror of such extraneous matter into the jury's deliberations, subject to review by an Appellate Court prior to a re-trial?

2. Does the United States District Court have authority (or jurisdiction) to consider the affidavits and testimony of jurors disclosing misconduct by a member of the jury outside the jury room and disclosing that the juror injected extraneous material, so obtained, into the deliberations?

STATEMENT OF CASE.

The Petitioner, Aluminum Company of America, is a Pennsylvania corporation and operates a smelting plant for the reduction of aluminum at Alcoa in Blount County, Tennessee. The respondents are citizens and residents of Blount County, Tennessee, and individually own or operate farms in Blount County.

The respondents instituted suit in the United States District Court for the Eastern District of Tennessee, Northern Division, seeking to recover damages to their lands, crops, and livestock occasioned by the emission of noxious gases in the operation of petitioner's reduction plant.

Seventy-five separate claims were jointly initiated in the District Court. Final disposition has been made of all claims except fifteen. The respondents in these fifteen actions were granted new trials because E. E. Hartman, one of the jurors, twice visited the area involved during the course of the trial and reported of his observations to the remaining jurors (A. 15a).

On one of his visits to the critical area, the recalcitrant juror slowed his automobile to observe cattle near the petitioner's north plant; and he reported to his fellow jurors that he had never seen finer looking animals (R. 210a, 211a, 212a). Comments on his observations were made in the jury-room on various occasions, for the jurors interrogated overheard his statements at different times (R. 207a, 218a, 223a).

Motions for new trials were seasonably filed.

The misconduct of the juror, Hartman, was brought to the attention of the District Court by affidavits, and at

the hearing on the motions, oral evidence was adduced to show his misconduct.

Based upon the affidavits and upon the testimony adduced, new trials were granted the respondents herein. Petitioner sought a review by Appeal coupled in the alternative with a petition for a Writ of Certiorari. The Appeal was dismissed and the Writ of Certiorari denied by the United States Court of Appeals for the Sixth Circuit. This petition results.

ARGUMENT.

POINT I.

The Order Granting New Trials Is Not a Final Decision Subject to Review.

Petitioner seeks a review of the allowance of new trials to the respondents. Such review is premature.

With certain exceptions not here material, **28 U. S. C. A., Section 1291,** grants the courts of appeals jurisdiction to review **only final decisions. Baltimore Contractors, Inc. v. Bodinger, 348 U. S. 176, 99 L. Ed. 233, 75 S. Ct. 249; Cohen, Exrx v. Beneficial Industrial Loan Corp., 337 U. S. 541, 93 L. Ed. 1528, 69 S. Ct. 1221.**

In **Cobbledick v. United States, 309 U. S. 323, 84 L. Ed., 783, 60 S. Ct. 540,** this Court said:

> "Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all. Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piece-meal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration."

A decision is **final** for the purpose of appeal when it terminates the litigation on the merits and leaves nothing to be done but to enforce by execution what has been determined. **St. Louis, I. M & S. R. Co. v. Southern Exp.**

Co., 108 U. S. 24, 28, 27 L. Ed. 638, 639, 2 S. Ct. 6; United States v. Pile, 130 U. S. 280, 283, 32 L. Ed. 904, 905, 9 S. Ct. 523; Heike v. United States, 217 U. S. 423, 429, 54 L. Ed. 821, 824, 30 S. Ct. 539; Berman v. United States, 302 U. S. 211, 82 L. Ed. 204, 58 S. Ct. 164.

An order granting a new trial is not a final decision within the meaning of **28 U. S. C. A., Sec. 1291**, and therefore is not subject to review, for the allowance of a new trial sets aside the final judgment and there is no existing judgment from which an appeal can be taken. **Ford Motor Co. v. Busam Motor Sales, Inc. (C. A. 6), 185 F. 2nd 531; Frank Mercantile Corporation et al. v. Prudential Ins. Co. of America (C. C. A. 3, 1940), 115 F. 2nd 496; Libby McNeill & Libby v. Malmskold (C. C. A. 9, 1940), 115 F. 2nd 786.**

Admittedly, after final judgment, the action on a motion for new trial may be reviewed for an abuse of discretion by the trial court. **Felton v. Spiro (C. C. A. 6, 1897), 78 F. 576**; however, at this stage no appeal lies from the order.

The courts have uniformly refused to entertain an appeal from an order on a new trial except in two instances:

(1) Where the Court had no jurisdiction to grant the motion because not timely filed or considered. **Phillips v. Negley, 117 U. S. 665, 29 L. Ed. 1013; Bailey v. Slentz et al. (C. A. 10), 189 F. 2nd 406; Jackson v. Wilson Trucking Corp. (C. A. D. C.), 243 F. 2nd 212; Freid v. McGrath (C. A. D. C.), 133 F. 2nd 350.**

(2) Where the Court refused to exercise its discretion and consider the motion. **Felton v. Spiro (C. C. A. 6, 1897), 78 F. 576; Dwyer v. United States (C. C. A. 9, 1909), 170 F. 160.**

Respondents not only urge that the order under consideration is not appealable but also that it may not be reviewed by virtue of **28 U. S. C. A. 1651 (a)**, which is known as the "All Writs Statute."

It has been observed by the courts of appeals that the "All Writs Statute" does not grant the appellate court a roving commission to supervise the administration of justice in the district courts and review by writs any unappealable order which it believes should be reviewed in the interest of justice. **In re Sylvania Electric Products, Inc. (C. A. 1, 1955), 220 F. 2nd 423; In re Josephson (C. A. 1, 1954), 218 F. 2nd 174; Southern Railway Company v. Madden (C. A. 4, 1955), 224 F. 2nd 320.**

In **Roche, U. S. District Judge et al. v. Evaporated Milk Assn. et al., 319 U. S. 21, 87 L. Ed. 1185, 63 S. Ct. 938**, this Court noted (p. 29):

> "Where the appeal statutes establish the conditions of appellate review an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid these conditions and thwart the congressional policy against piecemeal appeals in criminal cases. Cobbledeck v. U. S., 309 U. S. 323, 60 S. Ct. 540, 84 L. Ed. 783. As was pointed out by Chief Justice Marshall, to grant the writ in such a case would be a plain evasion of the Congressional enactment that only final judgments be brought up for appellate review."

Accordingly, the petitioner is not entitled to a review of the order granting new trials to the respondents.

POINT II.

The District Court Had Jurisdiction to Grant New Trials on the Evidence of Jurors.

Jurisdiction relates to the controversy, the subject matter, and the parties; and it includes the power to err. **Pope v. United States, 323 U. S. 1, 89 L. Ed. 3, 65 S. Ct. 16; Fauntleroy v. Lum, 210 U. S. 230, 52 L. Ed. 1039, 28 S. Ct. 641; Burnet v. Desmormes Y. Alvorez, 226 U. S. 145, 57 L. Ed. 159, 33 S. Ct. 63**; and even were it conceded that the grounds advanced for a new trial were not well founded, it could only be said that the Court erred and not that it had no jurisdiction to consider the affidavits and testimony in support of the motion.

It is well recognized that even though jurors may not impeach their verdict, the testimony of jurors may be considered to disclose the introduction of extraneous matters into the jury's deliberation.

In **Mattox v. United States (1892), 146 U. S. 140, 36 L. Ed. 917, 13 S. Ct. 50**, this Court said:

> "There is, however, a recognized distinction between what may and may not be established by the testimony of jurors to set aside a verdict.
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> . . . . . .
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> "'. . . a juryman may testify to any extraneous influence, although not as to how far that influence operated upon his mind. So a juryman may testify in denial or explanation of acts or declarations outside of the jury room, where evidence of such acts has been given as ground for a new trial.' See also Ritchie v. Holbrooks, 7 Serg. and R. 458; Denn. v. Driver, 1 N. J. L. 166; Nelms v. State, 13 Smedes & M. 500;

Hawkins v. New Orleans P. & Pub. Co., 29 L. Ann. 134, 140; Whitney v. Whitman, 5 Mass. 405; Hix v. Drury, 5 Pick. 296. We regard the rule thus laid down as conformable to right reason and sustained by the weight of authority."

See also **Stone v. United States (C. C. A. 6, 1940), 113 F. 2nd 70**; and **City of Amarillo, Texas, v. Emery et al. (C. C. A. 5, 1934), 69 F. 2nd 626.**

In **Southern Pacific Co. v. Klinge (C. C. A. 10, 1933), 65 F. 2nd 85**, the Court said:

". . . if it is charged that a juror's conclusion was arrived at, not from the evidence, but as the result of bribery, or from the consideration of evidence or matters not a part of the trial proceedings, but brought in from the outside, such a charge can be and must be explored, and the testimony of a juror is competent in determining the existence of the fact."

Petitioner would make light of the impact which the recreant juror's observation had upon him and would infer that new trials were granted solely because he reported his impressions to the remaining jurors; but such is not the case.

The opinion of the District Court (A. 11a) and the order entered thereon (A. 15a) clearly show that new trials were allowed because of the juror's misconduct in visting the area as well as his misconduct in relating his impressions to the remaining jurors. Clearly the juror's observations impressed him, for he told three jurors about the cattle observed on three different occasions (R. 207a, 218a, 223a). Certainly this indicates that **his thinking** had been influenced by his observations, and it indicates that he was endeavoring to influence his fellow jurors.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX.

28 U. S. C. A. 1291 provides:

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

28 U. S. C. A. 1651a provides:

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.